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In The Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the decision below barring the Environmental Protection Agency and the states from establishing TMDLs on an annual, seasonal or other appropriate basis, which rests on the appearance of the word "daily" in the undefined term "total maximum daily load," contravenes basic principles of statutory interpretation as reflected in the decisions of this Court and those of other circuit courts.

2. Whether the decision below barring the Environmental Protection Agency and the states from expressing maximum pollution loads for impaired water bodies on an annual, seasonal or other appropriate basis leads to absurd and unjust results.

PARTIES TO THE PROCEEDINGS

Friends of the Earth, Inc. appeared as plaintiff in the proceedings below, the judgment in which review is sought. The United States Environmental Protection Agency appeared as defendant. The District of Columbia Water and Sewer Authority ("WASA") appeared as intervenor-defendant. National Association of Clean Water Agencies and the CSO Partnership appeared as *amici curiae*. All parties, intervenors and *amici* appearing before this Court are the same as those before the courts below.

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PETITION FOR A WRIT OF CERTIORARI

WASA petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006). WASA is an independent authority of the Government of the District of Columbia created in 1996 by the United States and the Government of the District of Columbia to distribute drinking water and provide wastewater collection and treatment to citizens and businesses in the metropolitan Washington, D.C. area. WASA operates the wastewater collection and treatment system for the District of Columbia, including the Blue Plains advanced wastewater treatment plant. Blue Plains serves portions of surrounding areas, including Fairfax County, Virginia, Loudoun County, Virginia, Montgomery County, Maryland, and Prince Georges County, Maryland, in addition to the District of Columbia. The service area for Blue Plains covers approximately 735 square miles.

OPINION BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 446 F.3d 140. WASA did not request panel and *en banc* rehearing. The court of appeals' mandate is included in the Appendix (App. 1c).

JURISDICTION

This case was filed in the district court pursuant to the Administrative Procedure Act. 5 U.S.C. §§ 551, *et seq.* The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . to judicial review thereof." *Id.* § 702. Under the APA, a reviewing court must set aside an agency

action only where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). Jurisdiction was under 28 U.S.C. § 1331.

Friends of the Earth appealed the district court's decision to the court of appeals, which entered its judgment on April 25, 2006.

This Court has jurisdiction to review the decision of the court of appeals by way of *certiorari* pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED IN THE CASE

Article I, § 1, of the United States Constitution provides in pertinent part that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States...."

Clean Water Act § 303(d), 33 U.S.C. § 1313(d) provides:

> (d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.
>
> (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1313(b)(1)(A) and section 1313(b)(1)(B) are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the

pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the

identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate

them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

> (B) Standard attained. For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

STATEMENT OF THE CASE

This case involves the important question of the EPA's and the states' statutory authority to control the levels of pollutants that may be released into lakes, rivers and streams where Clean Water Act permit limitations and other controls imposed on localities and commercial activities do not bring those water bodies into attainment with the water quality standards.

Congress adopted the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," *id.* at § 1251 and, to that end, created two overarching, but complementary, strategies within the statute. The primary strategy focuses upon limiting the amounts of pollutants discharged from a pollution source through the issuance of permits containing technology-based effluent limitations. *Id.* at § 1342.

The other, secondary, strategy is the Act's focus on water quality standards. *See Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 279 (D.C. Cir. 1981) (noting that the Clean Water Act "assigned secondary priority to the standards and placed primary emphasis upon both a point source discharge permit program and federal technology-based effluent limitations"). Sections 303(a) through (c) of the Act direct the states, with federal approval and oversight, to adopt and maintain water quality standards for surface waters. 33 U.S.C. §§ 1313(a)-(c). States designate the use or uses for which each waterway is to be protected (*e.g.*, recreation, propagation of fish) and determine the levels of water quality need to support the designation. *Id.* at § 1313(c)(2)(A).

Section 303(d), the provision at issue in this case, requires each state to identify those waters that will not achieve water quality standards after application of technology-based controls and effluent limitations. *Id.* at § 1313(d). For such waters (known as "water quality limited segments" or "WQLS"), states must establish pollutant loadings - called "Total Maximum Daily Loads" ("TMDLs") – for each pollutant of concern at a level necessary to implement the applicable water quality standard. *Id.* at § 1313(d)(1)(A), (C).

Congress did not define the term TMDL but did recognize that it equals the maximum concentration of a pollutant in a waterbody and is calculated "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." *Id.* at § 1313(d)(1)(C). EPA's regulations define a TMDL for a pollutant as the sum of (1) the "wasteload

allocations" allocated to point sources;[1] (2) the "load allocations" allocated to nonpoint sources or natural background; and (3) a margin of safety. 40 C.F.R. § 130.2(i). EPA regulations allow TMDLs to be expressed "in terms of either mass per time, toxicity, or other appropriate measure," 40 C.F.R. § 130.2(i), including, for example, annual or seasonal measures. EPA's approval of TMDLs is based upon a detailed scientific analysis and modeling of the particular pollutants of concern and water bodies at issue.

In 1998, the District of Columbia determined that the Anacostia River was in violation of the District's water quality standards for dissolved oxygen and turbidity (muddy or cloudy conditions). After assessing the conditions of the river, the pollutants of concern - biochemical oxygen demand ("BOD") and total suspended solids ("TSS") - and after complex scientific modeling, the District adopted, and EPA approved, a BOD TMDL measured on an annual basis and EPA established a TSS TMDL measured on seasonal average daily concentrations.

In 2003, Friends of the Earth filed suit against the EPA in the D.C. Circuit, claiming that both the BOD and the TSS TMDLs were insufficient for achieving the District's water quality standards and that EPA acted arbitrarily in approving them. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 333 F.3d 184 (D.C. Cir. 2003). The D.C. Circuit dismissed the action for lack of subject-matter jurisdiction. Friends of the Earth then filed suit in the district court for review pursuant to the APA. On consideration of that complaint and of the parties' cross-

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[1] A "point source" is "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). "Nonpoint sources" are sources of pollutants that are not "point sources," such as runoff from fields.

motions for summary judgment, the district court held the "TMDL locution ambiguous in the context of the Clean Water Act as a whole" and, "because sufficient evidence exists [in the Administrative Record] that the TMDLs [at issue] were reasonably calculated to achieve daily water quality standards," EPA and WASA's motions for summary judgment should be granted. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 346 F. Supp. 2d 182, 185 (D.D.C. 2004).

On appeal of the district court's decision, the D.C. Circuit found that all TMDLs must be expressed only as a quantity of a pollutant over a 24-hour day, despite the recognition in the Act that some events are seasonal and despite EPA's and the States' longstanding and previously unchallenged interpretation of the TMDL requirement, reversing the district court. *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140, 148 (D.C. Cir. 2006).

As discussed below, the D.C. Circuit's decision is in direct conflict with basic principles of statutory construction as reflected in prior decisions of the Supreme Court. The decision is also is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). There, the Second Circuit held on virtually identical facts that the application of pollutant load on a strictly daily basis, based merely on the use of the word "daily" in the phrase "total maximum daily load," is "absurd." *Id.* at 99. The Second Circuit held that TMDLs may be "expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies." *Id.* Of course, any such alternative expression results in a

daily average even though that daily average is too blunt an instrument to itself serve as an effective regulatory standard.

The D.C. Circuit's decision creates an intercircuit conflict on an issue of substantial public importance – the ability of EPA and each State to regulate literally "hundreds of different pollutants in thousands of different waterbodies" in the United States. *Id.* at 97. The decision also places into irreconcilable dispute the ability of businesses and government agencies that treat and discharge wastewater to obtain consistent and reasonable regulation. In particular, requirements imposed upon dischargers in the District of Columbia could be different from those imposed by neighboring states for the very same water bodies.

WASA now seeks the review of this Court.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Decision Barring The Environmental Protection Agency And The States From Establishing TMDLs On An Annual, Seasonal Or Other Appropriate Basis Conflicts With Principles Of Statutory Interpretation Adopted By This Court And Is In Direct Conflict With A Decision of the Second Circuit.

The panel below found that the appearance of the word "daily" in the phrase "total maximum daily load" means that Congress expressly intended that all TMDLs be measured on a 24-hour basis. 446 F.3d at 146 (App. 2a). This semantic assessment violates basic principles of statutory construction espoused by the Court. When read in context, the circuit court's decision cannot be sustained.

This Court has held that "[i]t is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citation omitted). "In determining whether Congress has specifically addressed the question at issue, a reviewing court *should not confine itself to examining a particular statutory provision in isolation.* The meaning – or ambiguity – of certain words or phrases may only be evident when placed in context." *Id.* at 132 (emphasis added). For example, in *Brown & Williamson*, the Court looked at the "core objectives" of the Food, Drug & Cosmetic Act ("FDCA") before finding that the FDA did not have jurisdiction or authority to regulate tobacco as a "drug" under the FDCA. *Id.* at 133, 161. Both this Court and the D.C. Circuit have held that the complexity of the Clean Water Act militates in favor of judicial deference to EPA's statutory construction. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 292 (D.C. Cir. 1981) ("Courts have held that the Clean Water Act is to be given a reasonable interpretation which is not parsed and dissected with the meticulous technicality applied in testing other statutes and instruments.").

Contrary to these principles, the D.C. Circuit plucked a single word - "daily"- from its context as an undefined term in § 303(d) and elevated it to the definitive standard. When placed in context with the rest of § 303 as well as the entire Clean Water Act, and not reviewed in isolation, the word "daily" cannot have the seminal meaning and importance attached to it by the circuit court. As the district court correctly concluded, "the term 'daily' from 'total maximum daily load' should not be read in isolation as a sacred signifier and bring an end to judicial review." *Friends of the Earth, Inc. v. Environmental Protection Agency*, 346 F. Supp. 2d 182, 190 (D.D.C. 2004).

When read in context with of the rest of section 303(d)(1)(C), a TMDL must be established at a "level necessary to implement the applicable water quality standards" and must take "seasonal variations and a margin of safety" into account. 33 U.S.C. § 1313(d)(1)(C). Thus, the statute expressly provides that TMDLs must be expressed in terms that are appropriate for the characteristics of both the waterbody at issue and the particular pollutant(s) of concern. This simply does not ordain that "daily" is the exclusive measurement for all possible pollutants for all waterbodies throughout the United States.

The D.C. Circuit did not directly address this argument. Instead, it said only that this "cannot be right." *Friends of the Earth v. Environmental Protection Agency*, 446 F.3d 140, 145 (D.C. Cir. 2006) (App. 6a). On the contrary, when placed in context with the rest of the section, EPA's interpretation is reasonable. An agency's construction of its governing statute is given "controlling weight" not only where the agency attempts to "fill[] a gap" in the statute, but also where the agency "'defines a term in a way that is reasonable in light of the legislature's revealed design.'" *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999) (citations omitted). The *Haggar* Court observed that a statute may still "be ambiguous, for purposes of *Chevron* analysis, without being inartful or deficient," noting that "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect." *Id.*

Also, when read in context with other sections of the Clean Water Act, the D.C. Circuit's new, judicially-created TMDL definition could preclude implementation of substantial portions of that Act. For example, Congress adopted section 402(q) of the Clean Water Act to regulate

discharges of pollutants from combined sewer systems[2] and directed that each permit, order or decree issued pursuant to the Clean Water Act for a discharge from a combined sewer must conform to the Combined Sewer Overflow Control Policy ("CSO Policy").[3] 33 U.S.C. § 1342(q)(1). The D.C. Circuit's decision, if sustained, is fundamentally inconsistent with Congress' approach to combined sewer overflow ("CSO") control, as reflected in the CSO Policy.

The CSO Policy provides that each local government with a combined storm and sanitary sewer system - like the District - must develop and implement a Long Term CSO Control Plan ("LTCP") that achieves compliance with applicable water quality standards. Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688, 18,691 (Apr. 19, 1994). The CSO Policy recognizes that CSO discharges are intermittent, rainfall-driven events, and, therefore, the CSO Policy promotes and encourages a flexible, site-specific approach to CSO control. *Id.* This approach is designed to

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[2] A combined sewer system ("CSS") carries both sewage, and during wet weather, storm water run off. Like many older cities in the United States, the District's sewer system consists of both separate and combined systems. Approximately one-third of the District (12,487 acres) is served by the CSS, which is located mostly in the older, central portion of the city.

[3] The Record before the lower courts showed there are nearly 800 CSO communities nationwide, including the District of Columbia. U. S. Environmental Protection Agency, Report to Congress -- Implementation and Enforcement of the Combined Sewer Overflow Control Policy at ES-5, EPA 833-R-01-003, (Dec. 2001) ("CSO Report to Congress"). When EPA developed the CSO Policy, it acknowledged that CSOs were a substantial water quality challenge which had been in existence for well over a century in most older, urban areas in the United States. The CSO Policy established for the first time a consistent national framework that recognized the site-specific controls needed to address CSO impacts on local waterbodies, and the financial challenges facing cities to cost-effectively control CSOs. Combined Sewer Overflow Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994).

take into account site-specific conditions such as individual sewer system characteristics, topography, geology, and rainfall that affect CSO discharge volume, frequency, duration, intensity, and pollutant loads. *See, e.g., id.* at 18,691-92.

The D.C. Circuit's decision requiring that TMDLs be expressed only on a daily basis directly conflicts with the CSO Policy. For example, a basic element of the CSO Policy's permit provisions is a requirement that permits issued after LTCP development include "numeric performance standards for the selected CSO controls, *based on average design conditions.*" *Id.* at 18,696. (Emphasis added). Further, the CSO Policy's long term control planning process requires an evaluation of control alternatives leading up to the selection of a final control plan:

> [T]he long-term CSO control plan [should] consider a reasonable range of alternatives. The plan should, for example, evaluate controls that would be necessary to achieve zero overflow events per year, an average of one to three, four to seven, and eight to twelve overflow events per year. Alternatively, the long-term plan could evaluate controls that achieve 100% capture, 90% capture, 85% capture, 80% capture, and 75% capture for treatment.

Id. at 18,692. Also, the CSO Policy gives CSO communities the option of developing a LTCP that, when implemented, provides for (1) no more than an average of four overflow events per year; (2) elimination or capture for treatment of no less than 85 percent by volume of the combined sewage; or (3) elimination or removal of no less than 85 percent of the mass of pollutants in the combined discharge. *Id.* at

18,692-93. Nationwide, only one half of the documented LTCPs identify sewer separation as one of the anticipated CSO control measures to be implemented. More than 200 CSO communities will employ CSO control measures that, consistent with Congressional intent, contemplate some continued CSO discharges after LTCP implementation. *See* CSO Report to Congress at 6-19 and 6-20.

Thus, the control alternatives and options in the CSO Policy authorize continued CSO discharges following LTCP implementation provided water quality standards are attained. None of these alternatives are consistent with the concept of a 24-hour load because they recognize that in the case of wet weather-driven discharges such as CSOs, water quality standards compliance is not dependent on the amount of pollutants discharged over a 24-hour period.

The D.C. Circuit discounted § 402(q) as "'post-enactment legislative history'" because it was not part of the original enactment of the Clean Water Act. *Friends of the Earth, Inc.*, 446 F.3d at 147 (citation omitted) (App. 11a). In fact, § 402(q) is not legislative history; rather, it is a part of the fabric of the Clean Water Act. Moreover, the court's interpretation runs directly contrary to this Court' analysis in *Brown & Williamson*, where the Court examined several statutes governing tobacco products enacted subsequent to the FDCA in order to determine whether the FDCA provided authority to regulate tobacco as a "drug." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137-38.

The United States Court of Appeals for the Second Circuit has rejected the interpretation of the term "daily" adopted by the D.C. Circuit and the notion that TMDLs can only be expressed in terms of a 24-hour day. *Natural Resources Defense Council, Inc., v. Muszynksi*, 268 F.3d 91, 98 (2d Cir. 2001). There, the Second Circuit said:

We believe, however, that the term "total maximum daily load" is susceptible to a broader range of meanings. Indeed, NRDC's overly narrow reading of the statute loses sight of the overall structure and purpose of the CWA. The CWA contemplates the establishment of TMDLs for an open-ended range of pollutants that are susceptible to effective regulation by such means. *See* 33 U.S.C. § 1313(d)(1)(c) (noting that states must establish TMDLs for all "pollutants which the Administrator identifies . . . as suitable for such calculation"). In the case of each pollutant, effective regulation requires agencies to determine how the pollutant enters, interacts with, and, at a certain level or under certain conditions, adversely impacts an affected waterbody. In the case of highly toxic pollutants that may work harmful effects upon a waterbody almost immediately when present at small levels, close regulation at a daily level may be most appropriate. In the case of other pollutants, like phosphorus, the amounts waterbodies can tolerate vary depending upon the waterbody and the season of the year, while the harmful consequences of excessive amounts may not occur immediately. In short, the CWA's effective enforcement requires agency analysis and application of information concerning a broad range of pollutants. We are not prepared to say Congress intended that such far-ranging agency expertise be narrowly confined in

> application to regulation of pollutant loads on a strictly daily basis. Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one.

Id. at 98-99. WASA submits that the Second Circuit's analysis is correct and, unlike the D.C. Circuit's opinion below, is consistent with this Court's rules for statutory construction.

II. The D.C. Circuit's Decision Barring The Environmental Protection Agency And The States From Establishing TMDLs On An Annual, Seasonal Or Other Appropriate Basis Leads To Absurd Results As Concluded By The Second Circuit.

Another basic principle virtually ignored in the D.C. Circuit's opinion is that a court must avoid statutory interpretations that lead to absurdities or unjust results, if alternate, reasonable interpretations may be found. *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892). "General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *United States v. Kirby*, 74 U.S. 482, 486-87 (1869). *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.") As explained above, the Second Circuit has already found that

a 24-hour interpretation is "absurd." *Muszynski*, 268 F.3d at 99.

Here, the D.C. Circuit's decision leads to the same absurd and unjust results described by the Second Circuit. In particular, the decision could result in drastically different water quality-based requirements for discharges in the District of Columbia (which is in the D.C. Circuit) from those originating in adjacent states (which are in the Fourth Circuit) for the very same water bodies.

Moreover, the decision could lead to dramatically increased costs for ratepayers, extended and widespread disruptions, and *poorer water quality* if it is applied to require daily load caps on CSO discharges. For example, the Administrative Record before the lower courts in the present case demonstrated that, in accordance with the CSO Policy, WASA identified a number of control alternatives during the development of its LTCP. Studies conducted in connection with preparation of the LTCP found that in order to totally eliminate CSO discharges and thereby achieve a BOD waste load allocation which imposed a daily load cap, the combined sewer system would have to be completely separated. WASA's LTCP also concluded that complete separation of the combined sewer system would not be economically or technically feasible as it would lead, in part, to the following.

- Disruption – Separation essentially involves constructing a duplicate sewer system for the central one third of the District. Sewer construction would be necessary in every neighborhood and in the vast majority of streets in each neighborhood. Disruption associated with construction would

be significant, widespread, and long lasting....

- Impacts to Private Property – the majority of buildings in the combined sewer area have roof drains and gutters discharging to the building sanitary system, which in turn discharges to the combined sewer system. Separation on private property would thus be required. Past separation experience in the District and in other cities has shown that obtaining access and permission from private property owners can be difficult, time consuming, and, in some cases, not achievable....

- Technical Difficulty – Other cities have discovered some separation projects to be much more difficult to construct that [sic] originally anticipated. In some cases, the efforts to separate sewer systems have been abandoned. Part of the reason for this is that there are many unknowns involved in working with sewer systems which have been constructed over a long period of time. Records showing the location and nature of existing facilities may not exist. Costs and difficulties of construction can be much greater than originally anticipated depending on what is actually

> discovered. Public opposition to such a program may increase as actual construction proceeds.

JA 529-530; pp. 8-23 to 8-24.

WASA's LTCP found also that complete separation of the combined sewer system would provide less water quality benefit to the Anacostia than the final plan because separation diverts more water to the storm water system. The LTCP explains how this, in turn, can adversely affect water quality.

> [T]he separate storm water system delivers pollutants to the receiving waters practically every time it rains, thereby adversely impacting water quality a great many times per year. With a high degree of CSO control, the loads is [sic] only delivered to the receiving water between 2 and 12 times per year (depending on the degree of control selected). Even though the overall load may be somewhat higher, CSO discharges have a more limited impact because they are occurring far less frequently than storm water discharges which occur more than 70 times per average year.

JA 530; p. 8-24.

Thus, the D.C. Circuit's interpretation could result in increased pollutant loadings to the Nation's waters and contravene the basic purposes of the Clean Water Act, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. §

1251. *See, e.g., Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (internal citation omitted) ("Our duty then is 'to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

The D.C. Circuit ignored the Administrative Record, holding that its own prior decisions for demonstrating an absurdity apply an "exceptionally high burden." *Friends of the Earth, Inc.* , 446 F.3d at 146 (App. 9a). And, according to the court, EPA failed to meet that burden because it conceded that daily loads make sense in some circumstances. This analysis circumvents this Court's long-standing requirement that statutory interpretations should not result in an absurdity.

III. This Case Involves An Important Question of Federal Law Concerning the Breadth and Scope of the TMDL Requirement That Has Not Been, But Should Be, Settled by this Court.

This Court has determined that the Clean Water Act should be liberally construed in conformance with its remedial purposes to avoid harsh and incongruous results and that the complexity of the Clean Water Act militates in favor of judicial deference to EPA's statutory construction. *See Chem. Mfrg. Ass'n v. NRDC*, 470 U.S. 116, 125 (1985); *United States v. Riverside Homes, Inc.*, 474 U.S. 121, 131-134 (1985).

The Court has yet to address the issue of what properly constitutes a valid TMDL. As such, the issue remains unsettled and the circuits have now created disparate interpretations in an effort to resolve the issue. The immediate case presents this Court with an opportunity to resolve the important federal question of what constitutes the appropriate measure for a TMDL, which will effect how each state and EPA will control literally "hundreds of different pollutants in thousands of different waterbodies" in the United States. 268 F.3d at 97.

CONCLUSION

The D.C. Circuit's decision that TMDLs must be expressed only as a quantity of pollutant over a 24-hour day fails to apply basic principles of statutory construction required by this Court and is in direct conflict with the Clean Water Act. If allowed to stand, there will remain an intercircuit split that could undermine CSO control planning and implementation to the detriment of water quality. Therefore, WASA requests that this Court grant WASA's petition and resolve this conflict between the circuits.

Respectfully Submitted,

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No. 06-119

In the Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, PETITIONER

v.

FRIENDS OF THE EARTH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, under Section 303(d) of the Clean Water Act, 33 U.S.C. 1313(d), the Environmental Protection Agency and the District of Columbia are required to express maximum pollutant loads for impaired water bodies on a daily basis.

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In the Supreme Court of the United States

No. 06-115

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY, PETITIONER

v.

FRIENDS OF THE EARTH, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 446 F.3d 140. The opinion of the district court (Pet. App. 1b-37b) is reported at 346 F. Supp. 2d 182.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1c-2c) was entered on April 25, 2006. The petition for a writ of certiorari was filed on July 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the

chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 303 of the CWA requires each State (as well as the District of Columbia, 33 U.S.C. 1362(3)) to adopt water quality standards applicable to its waters. 33 U.S.C. 1313(a)-(c).

The CWA prohibits the unauthorized discharge of a pollutant from a point source into a water of the United States. 33 U.S.C. 1311(a), 1362(12).[1] A discharger may comply with the Act by obtaining and adhering to the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to 33 U.S.C. 1342. NPDES permits contain technology-based effluent limitations that reflect the pollution reduction achievable based on particular equipment or process changes, without reference to the effect on the receiving water. Where necessary, they also include more stringent effluent limitations (known as "water quality-based effluent limitations") necessary to ensure that the receiving waters achieve applicable water quality standards. See 33 U.S.C. 1311(b).

Congress also required States to establish "total maximum daily loads" (TMDLs) for "those waters within its boundaries for which the effluent limitations * * * are not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. 1313(d)(1)(A) and (C). States must establish a priority ranking for such waters, and then, in accordance with that priority ranking, develop for each water body a

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[1] A "point source" is "any discernible, confined and discrete conveyance * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). "Nonpoint sources" are sources of pollution that are not "point sources," such as runoff from agricultural activities.

TMDL for each pollutant that the Environmental Protection Agency (EPA) has determined to be suitable for a TMDL. *Ibid.* EPA has determined that "[a]ll pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. 60,665 (1978) (emphasis omitted). States must submit their TMDLs to EPA for approval. 33 U.S.C. 1313(d)(2).

A TMDL "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety." 33 U.S.C. 1313(d)(1)(C). The term "total maximum daily load" is not further defined in the CWA. EPA's regulations define a TMDL to be the sum of (1) the "wasteload allocations" allocated to point sources; (2) the "load allocations" attributed to nonpoint sources or natural background; and (3) a margin of safety. 40 C.F.R. 130.2(g)-(i).

TMDLs are not self-executing. Like water quality standards, wasteload allocations for point sources are implemented through NPDES permits issued pursuant to 33 U.S.C. 1342. See 40 C.F.R. 122.44(d)(1)(vii)(B).[2] Load allocations for nonpoint sources are implemented through voluntary or cooperative approaches, or by State or local law. See generally *Pronsolino* v. *Nastri*, 291 F.3d 1123, 1126-1127 (9th Cir. 2002), cert. denied, 539 U.S. 926 (2003).

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[2]Even in the absence of TMDLs, permits must include effluent limitations as stringent as necessary to meet water quality standards. 33 U.S.C. 1311(b)(1)(C). A TMDL is simply one tool for establishing such limitations.

2. The Anacostia River originates in Maryland and flows through the District of Columbia before joining the Potomac River. C.A. App. 665. Pursuant to 33 U.S.C. 1313(d)(1)(A), the District identified the portion of the river that flows through the District as not meeting its water quality standards for dissolved oxygen and turbidity (muddy or cloudy conditions). C.A. App. 390, 666, 724-725. The two TMDLs at issue here address those impairments.

The District's dissolved oxygen water quality standard seeks to protect water quality by requiring a minimum level of dissolved oxygen upon which aquatic organisms rely. Certain pollutants consume dissolved oxygen. One measure of the rate at which dissolved oxygen is consumed is a parameter called "biochemical oxygen demand" (BOD). The District established the BOD TMDL using a computer model that projected how a given percentage reduction in pollutant loads would affect dissolved oxygen levels. C.A. App. 146, 152-214, 269-272. The TMDL sets an annual average load reduction for BOD from storm water loads and combined sewer overflows (CSOs) based on the results of the modeling and the application of best professional judgment. *Id.* at 396-400, 402, 408-442, 678-679, 684-685. The District concluded, and EPA agreed, that expressing the BOD TMDL in terms of annual average loads of BOD was appropriate because the undesirable increases in BOD were attributable to the aggregate accumulation of oxygen-demanding materials over an annual cycle. *Id.* at 395-396, 398, 684.

The Anacostia River also fails to meet the District's water quality standard for turbidity. See C.A. App. 745. Excessive levels of total suspended solids (TSS) were identified as the main cause of these violations. *Id.* at

55. EPA developed a TMDL to protect fish, shellfish, and wildlife by setting TSS loads at a seasonal median average concentration of less than 15 mg/l for the period from April 1 through October 31, which assures water clarity sufficient for the growth of the aquatic vegetation necessary to sustain aquatic wildlife. *Id.* at 94, 107, 745-749, 803, 806. EPA also concluded that the required load was appropriately expressed as a seasonal load. While submerged aquatic vegetation provides essential food and habitat for aquatic organisms every day throughout the year, EPA concluded that TSS concentrations in the water column do not substantially impact the submerged aquatic vegetation community on a daily basis or outside the growing season of April 1 to October 31. *Id.* at 94, 113, 775, 803-806.

3. Respondent Friends of the Earth brought this action against EPA for judicial review of the TMDLs, and petitioner Water and Sewer Authority (WASA) intervened as a defendant. Respondent contended, *inter alia*, that TMDLs must be expressed as "daily" loads. C.A. App. 808-825.

The district court granted EPA's motion for summary judgment. Pet. App. 1b-37b. In light of the complexity of the statutory scheme and the function of TMDLs as an intermediate tool for achieving compliance with water quality standards, the court concluded that Congress had not expressed an unambiguous intent that every TMDL must be set on a daily basis, "when certain pollutants are more amenable to regulation through seasonal or annual calculations." *Id.* at 12b. Accordingly, the court determined that under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), it was required to defer to EPA's reasonable interpretation and application of the statute. Pet. App. 19b-22b. Here, the court found that

EPA had reasonably established annual and seasonal loads because of the specific nature of the pollution problems being addressed. *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-13a. It concluded that the CWA unambiguously requires daily loads for all TMDLs. *Id.* at 5a-13a. The court therefore rejected EPA's reliance on its judgment that the limits for some pollutants, such as BOD and TSS, are more appropriately expressed with non-daily load allocations. *Id.* at 6a-8a. In doing so, the court declined to follow a decision of the Second Circuit holding that TMDLs may be expressed in terms other than daily load allocations. *Id.* at 9a (discussing *NRDC* v. *Muszynski*, 268 F.3d 91, 99 (2001)).

The court also rejected petitioner's argument that Congress's enactment of subsequent legislation addressing combined sewer overflows indicates that EPA has flexibility in interpreting the TMDL requirements. Pet. App. 9a-12a. The court held that the CSO policy endorsed by Congress requires full compliance with the other provisions of the CWA, and stated that petitioner could not rely on subsequent legislation to establish the intent of an earlier Congress. *Id.* at 11a. The court remanded for the district court to vacate EPA's approval of the TMDLs, but allowed the parties to seek a stay pending the establishment of new TMDLs. *Id.* at 12a-13a.[3]

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[3]The court also rejected EPA's claim that the case had become moot because the District had, while the case was on appeal, revised the water quality standards for dissolved oxygen and turbidity that apply to the Anacostia. Pet. App. 11a-12a. The court explained that because "[t]he TMDLs at issue here have never been

ARGUMENT

The court of appeals erred in holding that the CWA requires EPA to establish TMDLs as daily load allocations. Nevertheless, the court's decision does not warrant this Court's review. The judgment will have only limited effect because it is controlling law only in the District of Columbia. Moreover, EPA recently issued nationwide guidance for expressing TMDLs as daily loads. As a result, future controversies about the meaning of the CWA's provisions for TMDLs will likely arise in significantly different contexts.

1. Contrary to the holding of the court of appeals, the use of the word "daily" in the term "total maximum daily load" is not an unambiguous direction that TMDLs must be stated in the form of a uniformly applicable 24-hour load. "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

The CWA neither defines the term "total maximum daily load" nor specifies how a TMDL should be expressed. Instead, the Act explains that TMDLs are intended "to implement * * * water quality standard[s]," and therefore:

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repealed or superseded," they continue to be relevant to the NPDES permitting process. *Ibid.* On further reflection, the government agrees that the case is not moot.

> shall be established at a level *necessary to implement the applicable water quality standards with seasonal variations* and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

33 U.S.C. 1313(d)(1)(A) and (C) (emphasis added). Thus, the crucial hallmark and function of a TMDL is not that it is expressed in daily terms, but that it is set at a "level necessary to implement the applicable water quality standards with seasonal variations." 33 U.S.C. 1313(d)(1)(C).

Because the "necessary" level can vary, especially "with seasonal variations," 33 U.S.C. 1313(d)(1)(C), the term "daily" should not be read in isolation to require that every TMDL be established on an inflexible 24-hour basis. In some circumstances, TMDLs with non-daily allocations best reflect the levels necessary to meet a water quality standard for a particular pollutant in a particular water body (be it a river, stream, pond, lake, or reservoir). While many TMDLs can easily be expressed in terms of a 24-hour time period, such as those for some pollutants discharged from point sources in a predictable and continuous manner, other TMDLs may more appropriately use a non-daily load, such as an hourly, weekly, monthly, seasonal, or annual load.

In this case, for example, the pollutants of concern—BOD and TSS—primarily enter the Anacostia River during rainstorms. Thus, discharges of BOD and TSS will vary widely from one day to the next. In addition, BOD affects water quality indirectly by fueling a variety of biological and chemical reactions that reduce dissolved oxygen in the water. These reactions are de-

pendent on such factors as temperature, biological activity, sunlight, tides, and the volume and speed of flow of water in the river. C.A. App. 183-214. This variable reaction rate means that the BOD discharged today may not cause a problem today, but can accumulate and under certain conditions affect dissolved oxygen levels in the Anacostia River in the future. *Id.* at 221.

Similarly, TSS can have a negative physical effect by blocking sunlight from reaching submerged aquatic vegetation, which prevents or slows photosynthesis and thus affects the growth and survival of such vegetation. For this reason, TSS discharges are not significant if they occur on any given day, but rather when they reduce water clarity overall within the growing season to the extent that the reduced sunlight affects the growth and survival of submerged aquatic vegetation. C.A. App. 777.

The varied and complex circumstances of water pollution underscore that Congress's direction that TMDLs be "established at a level necessary to implement the applicable water quality standards with seasonal variations," 33 U.S.C. 1313(d)(1)(C), does not unambiguously impose a rigid one-size-fits-all requirement that every TMDL be expressed as a 24-hour load. The court of appeals' contrary reading "loses sight of the overall structure and purpose of the CWA." *NRDC* v. *Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001). It is also contrary to longstanding EPA regulations and guidance entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See 40 C.F.R. 130.2(i) ("TMDLs can be expressed in terms of either mass per time, toxicity or other appropriate measure."); 50 Fed. Reg. 1776 (1985) ("TMDLs * * * may be expressed in terms of an appropriate averaging period, such as weekly or monthly,

as long as compliance with applicable [water quality standards] is assured.").

2. The Second Circuit correctly upheld non-daily TMDLs in *Muszynski*, 268 F.3d at 98-99. There, the court approved TMDLs that were expressed as seasonal and annual loads and declined to ascribe to Congress the irrational intent to impose a strict requirement of daily loads, "given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one." *Id.* at 99.

The conflict between *Muszynski* and the decision below does not, however, warrant this Court's review. The decision below is controlling law only in the District of Columbia. TMDLs are written by the States and approved by EPA Regional Administrators, or generated by EPA, and they are generally reviewed under the Administrative Procedure Act in federal district courts in the States where the impaired water bodies are located.

Moreover, EPA recently issued a guidance memorandum for the States and EPA Regions "recommend[ing] that all future TMDLs * * * be expressed in daily time increments," even in States within the Second Circuit. App., *infra*, 2a, 3a n.1. The guidance explains, however, that there is flexibility in how the daily loads may be expressed. *Id.* at 3a-5a. For example, in some circumstances TMDLs may be "expressed in terms of differing maximum daily values depending on the season of the year, stream flow (*e.g.*, wet v. dry weather conditions) or other factors." *Id.* at 4a.

As a result of EPA's new guidance, the current disagreement between the D.C. and Second Circuits will have only limited prospective effect, because new TMDLs will likely be drafted in a way that is consistent with the D.C. Circuit's decision but that also provides

the necessary flexibility. Because any future controversies concerning TMDLs will likely arise in the significantly different context of the approach outlined in EPA's new guidance, this Court's review is not warranted at this time.

3. Finally, there is no merit to petitioner's argument that requiring TMDLs to be expressed on a daily basis "directly conflicts" with Section 402(q) of the Act, which concerns combined sewer overflows. As EPA's new guidance explains, expressing *TMDLs* on a daily basis does not require that *permits* be expressed on that basis. See App., *infra*, 7a-11a.

Section 402(q) states that discharge permits, orders, and decrees "shall conform" to EPA's Combined Sewer Overflow Control Policy (CSO Control Policy), 59 Fed. Reg. 18,688 (1994). 33 U.S.C. 1342(q)(1). Petitioner correctly describes (Pet. 13-14) that policy as promoting a flexible, site-specific approach for achieving compliance with CWA requirements. See 59 Fed. Reg. at 18,688.

Consistent with the CSO Control Policy's call for a flexible, site-specific approach, and with the flexibility provided by the NPDES provisions, the permitting authority may establish water quality-based effluent limitations in an NPDES permit that are not expressed as daily limitations. The statute and regulations provide flexibility in the manner in which effluent limitations for non-continuous discharges such as CSOs are expressed. See 33 U.S.C. 1342; 40 C.F.R 122.45(e). While water quality-based effluent limitations must be consistent with the assumptions and requirements of available wasteload allocations in TMDLs approved by EPA (40 C.F.R. 130.7), those assumptions may include irregularity in the volume and frequency of storm water flows.

See App., *infra*, 5a-6a, 9a-10a. Thus, as EPA's new guidance explains, a TMDL expressed as a daily load can be implemented in an NPDES permit authorizing discharges of overflows from a combined sewer system consistent with EPA's CSO Control Policy and Section 402(q) of the CWA. See App., *infra*, 7a-10a; cf. Pet. App. 11a ("[T]he tension between the CSO Policy's flexibility and the perceived rigidity of daily loads exists only if daily loads must of necessity be set so low that any storm-event discharge would violate them—a premise unsupported anywhere in the record.").

Because expressing a TMDL as a daily load does not interfere with a permit writer's authority under the regulations to translate that daily load into the appropriate permit limitation, which in turn could be expressed as an hourly, weekly, monthly, or other measure as appropriate, petitioner's concern is misplaced. No court of appeals has rejected that approach to reconciling TMDLs expressed as daily loads with the CSO provisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX

November 15, 2006

MEMORANDUM

SUBJECT: Establishing TMDL "Daily" Loads in Light of the Decision by the U.S. Court of Appeals for the D.C. Circuit in *Friends of the Earth, Inc. v. EPA, et al.*, No.05-5015, (April 25, 2006) and Implications for NPDES Permits

FROM: Benjamin H. Grumbles,
Assistant Administrator

TO: Director, Office of Ecosystem Protection, Region 1
Director, Division of Environmental Planning and Protection, Region 2
Water Division Directors, Regions 3-7 and Region 9
Director, Office of Ecosystems Protection and Remediation, Region 8
Director, Office of Environmental Cleanup, Region 10

The purpose of this memorandum is to clarify EPA's expectations concerning the appropriate time increment used to express "total maximum daily loads" (TMDLs) in light of the recent decision by the U. S. Court of Appeals for the D.C. Circuit in *Friends of the Earth,*

Inc. v. EPA, et al., No. 05-5015 (D.C. Cir. 2006). In *Friends of the Earth*, the D.C. Circuit held that two TMDLs for the Anacostia River (one established by EPA and one approved by EPA) did not comply with the Clean Water Act because they were not expressed as "daily" loads.

The *Friends of the Earth* decision has raised some questions regarding the establishment of both TMDLs and effluent limits in National Pollutant Discharge Elimination System (NPDES) permits that implement wasteload allocations established in TMDLs. As explained in more detail below, EPA recommends that all future TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments. However, EPA does not believe that the *Friends of the Earth* decision requires any changes to EPA's existing policy and guidance describing how a TMDL's wasteload allocations are implemented in NPDES permits.

EPA's Expectations Regarding "Daily" Loads in TMDLs

EPA continues to believe that the use of the word "daily" in the term "total maximum daily load" is not an unambiguous direction from Congress that TMDLs must be stated in the form of a uniformly applicable 24-hour load. However at this time, there is significant legal uncertainty about whether courts across the country will follow the reasoning of the D.C. Circuit decision in *Friends of the Earth* or that of the U.S. Court of Appeals for the Second Circuit in their decision

in *NRDC v. Muszynski*[1]. In light of that uncertainty, EPA recommends that all TMDLs and associated load allocations and wasteload allocations be expressed in terms of daily time increments. In addition, TMDL submissions may include alternative, non-daily pollutant load expressions in order to facilitate implementation of the applicable water quality standards. TMDLs must continue to be established at a level necessary to attain and maintain the applicable water quality standards, account for seasonal variations and include a margin of safety. Because water quality standards are expressed in a variety of ways and because pollutants and water bodies have different characteristics, EPA believes that there is some flexibility in how the daily time increments may be expressed. The following are a few examples of this potential flexibility:

- If consistent with the applicable water quality standard and technically suitable for the pollutant and water body type in question, a TMDL and associated load allocations and wasteload

[1] In *NRDC v. Muszynski*, 268 F.3d 91 (2nd Cir. 2001), NRDC challenged EPA's approval of nutrient TMDLs with annual loads established by New York for reservoirs. The Second Circuit held that "the term 'total maximum daily load' is susceptible to a broader range of meanings" than loads calculated on a daily basis. 268 F.3d at 98-99. The D. C. Circuit decision in *Friends of the Earth* is controlling legal precedent for cases brought in the District of Columbia Circuit while the Second Circuit decision in *Muszynski* is controlling legal precedent in cases brought in the Second Circuit, which includes the States of New York, Connecticut, and Vermont. EPA encourages the three States within the Second Circuit, to submit TMDLs with "daily" loads in a manner consistent with this memorandum. EPA also recognizes that, while the Second Circuit did not vacate the TMDLs in question merely because they did not contain "daily" loads, it required a reasoned explanation for the choice of any particular "non-daily" load.

allocations may be expressed as both minimum and maximum daily loads, or as average daily loads. For example, a TMDL for the pollutant parameter pH may include both minimum and maximum values consistent with how the applicable WQS for the parameter pH is expressed (commonly as a range.)

- If technically appropriate and consistent with the applicable water quality standard, it may also be appropriate for the TMDL and associated load allocations and wasteload allocations to be expressed in terms of differing maximum daily values depending on the season of the year, stream flow (e.g., wet v. dry weather conditions) or other factors. In situations where pollutant loads, water body flows, or other environmental factors are highly dynamic, it may be appropriate for TMDLs and associated allocations to be expressed as functions of controlling factors such as water body flow. For example, a load-duration curve approach to expressing a TMDL and associated allocations might be appropriate, provided it clearly identifies the allowable daily pollutant load for any given day as a function of the flow occurring that day. Using the load-duration curve approach also has the advantage of addressing seasonal variations as required by the statute and the regulations.
- For TMDLs that are expressed as a concentration of a pollutant, a possible approach would be to use a table and/or graph to express the TMDL as daily loads for a range of possible daily stream flows. The in-stream water quality cri-

terion multiplied by daily stream flow and the appropriate conversion factor would translate the applicable criterion into a daily target (TMDL).

EPA will issue additional technical guidance providing specific information regarding the establishment of daily loads for specific pollutants that will take into consideration the averaging period of the pollutant, the type of water body, and the type of sources the TMDL needs to address.

Facilitating Implementation of Wasteload Allocations through the NPDES Permit Process

In certain circumstances (e.g., impairments caused by storm water), or where the applicable water quality criteria are expressed as a long-term average, it may be appropriate for TMDL documents or their supporting analysis to clearly set forth the implementation-related assumptions underlying any wasteload allocation expressed as a "daily" load. To facilitate implementation of such a load in water bodies where the applicable water quality standard is expressed in non-daily-terms, it may be appropriate for the TMDL documentation to include, in addition to wasteload allocations expressed in daily time increments, wasteload allocations expressed as weekly, monthly, seasonal, annual, or other appropriate time increments. When this approach is taken, the TMDL and its supporting documentation should clearly explain that the non-daily loads and allocations are implementation-related assumptions of the daily wasteload allocations and are included to facilitate implementation of the daily allocations as appropriate in NPDES permits and nonpoint source

directed management measures. The supporting documentation should discuss the reasons for, and assumptions behind, the non-daily loads to facilitate their understanding and use in the implementation phase.

Recommendations Concerning Existing TMDLs and TMDLs in Process

Through significant effort of the States and EPA regions, more than 20,000 TMDLs have been established, most of them in the last five or six years. EPA's database also shows that approximately 65,000 causes of impairment still need to be addressed by TMDLs. EPA believes that continued development of TMDLs pursuant to State TMDL development schedules is the highest priority at this time. If already existing TMDLs need to be revised in the future, revision of the TMDLs and allocations should be consistent with the recommendations in this memorandum.

For TMDLs under development that have not yet been adopted by States or established by EPA, EPA recommends that such TMDLs and allocations be revised, if feasible, to be consistent with this memorandum prior to their adoption or establishment. If States adopt and submit TMDLs expressed solely in non-daily terms, EPA expects to ask the submitting State to provide written documentation regarding how the submitted TMDLs and allocations would be expressed in daily terms. Such documentation provided by States could then be included in the administrative records supporting EPA's decisions on the TMDLs. If it is unable to obtain such documentation from a State, EPA may develop calculations for its administrative

approval record demonstrating how the State's TMDLs and allocations would be expressed in daily terms. In this case, EPA would make it clear that its approval of the State's TMDL is contingent on the assumption that such TMDL contains the daily load calculations developed by EPA.

We recommend that States consult with EPA regarding specific TMDL projects early in the development process to determine appropriate approaches to expressing the TMDLs and allocations. We are working to provide technical support as soon as practicable. First, we will be providing a draft of a technical document outlining an approach for deriving daily limits for bacteria, TSS, sediments and nutrients using the load duration curve approach. In addition, we are preparing a series of technical fact sheets and case studies based on typical averaging periods of criteria, types of water body and types of sources, to provide technical support in developing daily loads for all pollutants. These should be available for review and comment within the next few months.

Implications of the Friends of the Earth Decision for NPDES Permits

The *Friends of the Earth* decision does not affect an NPDES permitting authority's ability to use the discretion available to it under the CWA and the NPDES regulations in establishing permit effluent limits and conditions.

There is no express or implied statutory requirement that effluent limitations in NPDES permits necessarily

be expressed in daily terms. The CWA definition of "effluent limitation" is quite broad ("effluent limitation" is "any restriction . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . ."). See CWA 502(11). Unlike the CWA's definition of TMDL, the CWA definition of "effluent limitation" does not contain a "daily" temporal restriction. Indeed, the central statutory requirement for water-quality based effluent limits in NPDES permits is that they implement applicable water quality standards. See CWA 301(b)(1)(C). Such water quality standards will include water quality criteria for various pollutant parameters that are expressed in terms of differing temporal periods of duration, including hourly, daily, weekly, monthly, seasonal, and annual, as appropriate for each pollutant parameter.[2] Accordingly, effluent limits in NPDES permits may be written in a form that derives from, and complies with, applicable water quality standards that use any of these various time measures. See 122.44(d)(1)(vii)(A).

EPA's regulations at 40 CFR § 122.44(d)(1)(vii) require the permitting authority to ensure that: (a) the level of water quality to be achieved by limits on point

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[2] Section 2.1of EPA's *Technical Support Document for Water Quality-based Toxics Control* (TSD) dated March 1991, describes the basis for establishing water quality criteria. EPA's recommended water quality criteria consist of three components: (1) magnitude, (2) duration, and (3) frequency. Magnitude refers to the concentration of the pollutant. Duration is the period of time (averaging period) over which the in-water concentration is averaged for comparison with criteria concentrations. This specification limits the length of time that in-water concentrations may exceed the criteria concentrations. Frequency is how often the criteria can be exceeded.

sources is derived from, and complies with, all applicable water quality standards; and (b) effluent limitations developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, *are consistent with the assumptions and requirements of any available wasteload allocation* for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. 130.7. This provision does not require that effluent limits in NPDES permits be expressed in a form that is identical to the form in which an available wasteload allocation for the discharge is expressed in a TMDL. 'Rather, permit limits need only be "consistent with the assumptions and requirements" of a TMDL's wasteload allocation.[3] To facilitate implementation of the TMDL, one of the stated "assumptions" of a TMDL's daily load or daily wasteload allocation might be that, for purposes of NPDES implementation in an appropriate context (e.g., storm water), the permit writer has the flexibility to express the permit's effluent limitation using a time frame in keeping with, and appropriate to, the water body and pollutant in question and the applicable water quality standard. Indeed, the TMDL submission might even include such alternate temporal expressions of the total load or the wasteload allocation as implementation assumptions.

The *Friends of the Earth* decision does not affect the NPDES permitting authority's ability to use all

[3] EPA's position on this issue was affirmed by the Environmental Appeals Board in *In re: City of Moscow, Idaho*, 10 E.A.D. 135, 148 (July 27, 2001) ("While the governing regulations require *consistency*, they do not require that the permit limitations that will finally be adopted in a final NPDES permit be *identical* to any of the WLAs that may be provided in a TMDL.")

available tools to translate TMDLs and their wasteload allocations into enforceable effluent limitations in discharge permits. For example, while the NPDES permitting regulations require "daily maximum" limits for continuous discharges from some point sources, the same regulations specifically authorize "average weekly" and "average monthly" limitations—rather than daily limitations—for discharges from publicly owned water treatment plants. See 40 C.F.R. 122.45(d). Moreover, the regulations further authorize the permit writer to use other unspecified units of time if it is impracticable to calculate daily, weekly or monthly limitations. *Id.* For non-continuous discharges, the regulations provide flexibility as to the manner in which such discharges are to be limited based on a consideration of factors, including frequency, total mass, maximum rate of discharge of pollutants and prohibition or limitation of specified pollutants by mass, concentration or other appropriate measure. See 40 C.F.R. 122.45(e).

NPDES permit regulations do not require that effluent limits in permits be expressed as maximum daily limits or even as numeric limitations in all circumstances, and such discretion exists regardless of the time increment chosen to express the TMDL. Therefore, expressing a TMDL as a daily load does not interfere with a permit writer's authority under the regulations to translate that daily load into the appropriate permit limitation, which in turn could be expressed as an hourly, weekly, monthly or other measure.

EPA will continue to use existing guidance and policy memoranda to guide the development of WQBELs that are consistent with both 40 CFR § 122.44(d)(1)(vii) and

40 CFR §122.45(d). These include: the *Technical Support Document for Water Quality-based Toxics Control* (TSD) dated March 1991, an EPA Memorandum titled *Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs* dated November 22, 2002, and a memorandum titled *Annual Permit Limits for Nitrogen and Phosphorus for Permits Designed to Protect Chesapeake Bay and its tidal tributaries from Excess Nutrient Loading under the National Pollutant Discharge Elimination System* dated March 3, 2004.

Recommendation Concerning NPDES Permits

EPA recommends that NPDES permitting authorities continue to establish effluent limits that implement wasteload allocations established in approved TMDLs in accordance with existing regulation, policy and guidance as described above.

cc: Ephraim King
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(4)

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No. 06-119

IN THE

Supreme Court of the United States

DISTRICT OF COLUMBIA
WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT FRIENDS OF THE EARTH IN OPPOSITION

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November 24, 2006

QUESTION PRESENTED

Whether a Clean Water Act mandate for establishment of the "total maximum daily load" is satisfied by setting loads that are annual and seasonal, and that are described by the Environmental Protection Agency (EPA) itself as "non-daily."

RULE 29.6 STATEMENT

Friends of the Earth is a nonprofit corporation organized under the laws of the District of Columbia. Friends of the Earth has no parent corporation, and no publicly held company owns stock in Friends of the Earth.

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COUNTERSTATEMENT

Among the Clean Water Act's "central objectives" is the achievement of water quality standards, *Arkansas v. Oklahoma*, 503 U.S. 91, 106 (1992), which are established to "protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter." 33 U.S.C. § 1313(c)(2)(A). For those waterbodies where technology-based controls are inadequate to achieve water quality standards, the Act requires establishment of the "total maximum daily load" of pollutants. § 1313(d)(1)(C). *See Arkansas*, 503 U.S. at 108.

At issue here are EPA decisions approving and establishing loads for the Anacostia River in the District of Columbia, where pollutant discharges deplete oxygen (thus killing fish and other aquatic life) and increase turbidity (thus impairing recreation and shading out aquatic plants). Despite the Act's mandate for the "total maximum daily load," EPA approved and set annual and seasonal loads.

Defending the ensuing court challenge, EPA did not even argue that its loads were "daily," but on the contrary conceded that they are "non-daily." EPA Br. in D.C. Cir. 05-5015 at 28 (emphasis added).[1] According to the agency, Congress did not "cast[] the phrase 'total maximum daily load' into stone," *id.* 33, and that phrase should not be treated as a "sacred signifier." *Id.* 27 (quoting district court).

The court of appeals, however, concluded that EPA "may not fulfill its obligation to establish daily loads by approving non-daily loads," Pet 8a, 446 F.3d at 146, and remanded to the

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[1]http://www.earthjustice.org/library/legal_docs/EPA-DCTMDL-brief.pdf.

district court with instructions to vacate EPA's approvals. Pet. 12a, 446 F.3d at 148.

EPA has not petitioned this Court for a writ of certiorari. Instead, the pending petition was filed by the District of Columbia Water and Sewer Authority (WASA), which intervened as a defendant in the district court.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS RESPECTED THE CLEAN WATER ACT AND THIS COURT'S PRECEDENT.

Plain meaning of statute. The court of appeals recognized that, under this Court's seminal *Chevron* decision, "if 'Congress has directly spoken to the precise question at issue ..., that is the end of the matter.'" Pet. 5a, 446 F.3d at 144 (quoting *Chevron USA v. NRDC*, 467 U.S. 837, 842 (1984)). Respecting this framework, the court correctly—and unremarkably—concluded that Congress, "by using the word 'daily,' settled the question of what period a 'total maximum load' should cover." Pet. 7a, 446 F.3d at 145.

The suggestion that the court of appeals should have deferred to EPA's interpretation (Pet. 11-12, Br. Amici Curiae of Natl. Assn. of Clean Water Agencies, *et al.*, (NACWA) at 7 n.7) is unavailing. EPA did not claim that the challenged loads fit within any possible meaning of the phrase "total maximum daily load," on the contrary conceding (as noted above) that they are "non-daily." Whatever deference EPA may receive when it interprets statutory language, none is due where it abrogates that language. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (Congress "did not delegate authority" to the agency to act "in a manner inconsistent with the statute. In the context of an unambiguous statute, we need not

contemplate deferring to the agency's interpretation."); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999), *cited in* Pet. 12 (an agency's interpretational discretion extends only to "those cases not covered by the statute's specific terms") (emphasis added).

Statutory context. WASA cites the principle that statutory language should be read in context (Pet. 11; NACWA Br. 13-15, 18), but that principle strongly supports the court of appeals' ruling in at least two ways.

First, § 1313(d)(1)(C) provides for establishment of "the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." (Emphasis added.) Section 1314(a)(2) in turn provides for the identification of pollutants suitable for "maximum daily load measurement." § 1314(a)(2)(D) (emphasis added). Thus, §1314(a)(2) confirms that maximum loads under §1313(d)(1)(C) are to be daily, not annual or seasonal.

Second, § 1313(d)(1)(C) requires that the "total maximum daily load" "shall be established at a level necessary to implement the applicable water quality standards with seasonal variations." (Emphasis added.) Thus, Congress knew the difference between "daily" and "seasonal." Its decision to require a "daily" load—rather than a seasonal or annual one—must be given effect.

Amendment by implication. Although section 1313(d)(1)(C) was enacted in 1972 and has not been amended since, WASA relies heavily on a 2000 amendment to a different section. Pet. 12-15 (citing § 1342(q)). That amendment neither amends nor even references § 1313(d)(1)(C).

Nor is there any basis for finding an implied amendment. *See United States v. Welden*, 377 U.S. 95, 102 n. 12 (1964) ("Amendments by implication, like repeals by implication, are not favored."). Section 1342(q) breathes not a word about total maximum daily loads, instead addressing "permit[s], order[s], or decree[s]." § 1342(q)(1). Moreover, § 1342(q) references a 1994 EPA Combined Sewer Overflow (CSO) Control Policy, which in turn reaffirms the need to achieve "compliance with the requirements of the CWA," 59 Fed. Reg. 18691 col. 2 (April 19, 1994), and indeed expressly envisions a "total maximum daily load" as a means of ensuring that CSO discharges meet water quality standards. *Id.* 18693 col. 1 (emphasis added). Thus the court of appeals properly rejected WASA's reliance on this provision. *See* Pet 11a, 446 F.3d at 147.[2]

Absurd results. There is no merit to WASA's argument that the statutory requirement for a "total maximum daily load" produces an absurdity. Contrary to WASA's claim, Pet. 21, the court of appeals properly placed the burden on the proponents of the absurd-results argument to make a strong showing. *See, e.g., Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (Court "ha[s] stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there"); *Barnhart*, 534 U.S. at 459 (rejecting absurd-results argument: "the Court rarely invokes such a test to override unambiguous

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[2] Similarly, § 1342(p)(3)(B)—cited at NACWA Br. 15-17—was added to the Act in 1987, and neither amends nor even references § 1313(d)(1)(C). Indeed, § 1342(p)(3)(B) does not even address total maximum daily loads, instead focusing on "[p]ermits for discharges from municipal storm sewers." (Emphasis added). Like § 1342(q), nothing in this provision speaks to the appropriate time frame for use in establishing § 1313(d)(1)(C) loads.

legislation"); *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *Dodd v. United States*, 545 U.S. 353, 125 S. Ct. 2478, 2483 (2005). In any event, regardless of how the burden is allocated, the daily-load mandate produces no absurdity. The Act expressly provides for (1) identifying pollutants "suitable for maximum daily load measurement correlated with the achievement of water quality objectives," § 1314(a)(2)(D) (emphasis added), and (2) establishing the "total maximum daily load" for pollutants thus identified. § 1313(d)(1)(C) (emphasis added). If a pollutant is suitable for a daily load—and EPA has determined that "[a]ll pollutants" are suitable, 43 Fed. Reg. 60665 col. 1 (December 28, 1978)—there is no absurdity in establishing such a load.

II. NO REASONS COUNSEL REVIEW BY THIS COURT.

WASA and its amicus offer no good reason warranting this Court's review.

Circuit split. There is no merit in the argument (Pet. 10, 18, 22; NACWA Br. 5-6) that this Court's review is needed to reconcile the decision below with *Natural Resources Defense Council v. Muszynski*, 268 F.3d 91 (2d Cir. 2001). Although *Muszynski* did make the anomalous claim that the Act "does not require T[otal] M[aximum] D[aily] L[oad]s to be expressed in terms of daily loads," *id.* 94 (emphasis added), the Second Circuit decision did not prohibit daily loads. EPA and states thus remain free to establish daily loads—as required by § 1313(d)'s express language, and confirmed by the decision below and a previous opinion of the Seventh Circuit.[3]

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[3] *Scott v. City of Hammond*, 741 F.2d 992, 996 (7th Cir. 1984) ("A TMDL establishes a maximum daily discharge of pollutants into a waterway. A TMDL must be obeyed even if

(... footnote continued next page)

Moreover, the concern that prompted the Second Circuit's divergence from plain meaning—*i.e.*, that some pollutants might not be suitable for "daily" loads, *see* 268 F.3d at 98-99—can be addressed if and when appropriate by EPA itself, through rulemaking to amend the § 1314(a)(2)(D) list. *See* § 1314(a)(2) (EPA can "from time to time" revise the list, "after consultation with appropriate Federal and State agencies and other interested persons"); Pet. 9a, 446 F.3d at 146 ("EPA conceded at oral argument that nothing forecloses the agency from reconsidering" the § 1314(a)(2)(D) list).

Impacts of decision below. Despite WASA's and NACWA's speculative assertions to the contrary, no impacts of the decision below justify this Court's review.

First, the prospect that EPA and states will need to refocus their efforts on establishing daily loads instead of longer-term seasonal or annual ones (*see* Pet. 22, NACWA Br. 7-8) is not a "new" requirement imposed by the D.C. Circuit's 2006 decision (*see* NACWA Br. 2-3), but is a three-decade-old requirement of the 1972 Clean Water Act—confirmed over two decades ago by the Seventh Circuit in *Scott*. To the extent that non-daily loads have already been established, they can remain in place while daily loads are being developed. Pet. 12a-13a, 446 F.3d at 148; Order of September 18, 2006 in D.D.C. 04cv92 RMU (at EPA's request, district court stays vacatur of non-daily loads until June 7, 2008, to allow time for development of daily loads).

Second, WASA's and NACWA's claims concerning the cost or feasibility of complying with daily loads (*see* Pet. 18-

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(... footnote continued from previous page)
a monthly allowable average could be achieved in the face of some daily discharges above the TMDL.")(emphasis added).

20, NACWA Br. 8-11, 15-17) are meritless. While confirming the statutory requirement that § 1313(d) loads be "daily," the decision below does not address, much less dictate, the stringency of those daily loads. EPA and states remain free to determine how much pollutant loading a TMDL should allow, as long as the TMDL meets the statutory requirements that it be "daily" and that it "implement the applicable water quality standards." § 1313(d)(1)(C). Thus the court below properly rejected WASA's compliance cost argument concerning combined sewer overflows, because "the tension between the CSO Policy's flexibility and the perceived rigidity of daily loads exists only if daily loads must of necessity be set so low that any storm-event discharge would violate them—a premise unsupported anywhere in the record." Pet. 11a, 446 F.3d at 147. The same fatal flaw characterizes WASA's and NACWA's arguments concerning alleged compliance costs of daily loads for waterbodies and pollutants other than the ones at issue below.[4]

NACWA's new arguments. Amicus NACWA advances two new arguments that were not briefed below (NACWA Br. Parts I.C. and III), and thus are foreclosed here. *See, e.g.*,

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[4] In addition to the fundamental error noted in the text, WASA and NACWA make numerous other incorrect assertions. For example, NACWA contends (at 10-11) that daily loads are in tension with a 2004 EPA memorandum on the Chesapeake Bay, but that memorandum addresses permits, not TMDLs. Hanlon/Capacasa Mem. at 1. Moreover, the memorandum expressly cautions that where a wasteload allocation for a given waterbody (*i.e.*, the point-source component of a TMDL, *see* 40 C.F.R. § 130.2(h) and (i)) is expressed "on a shorter term basis" such as "daily," permit limits must comply with that shorter-term load. Hanlon/Capacasa Mem. at 2.

EEOC v. FLRA, 476 U.S. 19, 24 (1986); *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). In any event, the arguments do not warrant this Court's review. First, NACWA claims (at 11-13) that removal of pollutants from the § 1314(a)(2) list would harm cleanup efforts. But EPA has not removed any pollutants from the list, and may never do so. *See* NACWA Br. 4-5 n.4 (three months after the court of appeals decision, EPA told the district court that it has no intention of revising the § 1314(a)(2) list). Second, contrary to NACWA's assertion (at 19), EPA never found that "proper technical conditions did not exist" to support development of daily loads here. Indeed, EPA could not have made such a finding, because daily loads were in fact developed here—but were then discarded in favor of longer-term annual and seasonal loads. *See* 346 F. Supp. 2d at 197 (discussing the computer model used to develop the loads at issue here, district court confirmed that "inputs into the model include only daily values, not average annual ones"). Because EPA did not rely on NACWA's theory, that theory cannot save the decisions under review. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943); *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: November 24, 2006.

Respectfully submitted,

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No. 06-0119

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In The Supreme Court of the United States

DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY ARGUMENT IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.6, Petitioner District of Columbia Water and Sewer Authority ("WASA") submits this reply to new points raised by Federal Respondents' opposition to the petition for writ of certiorari.[1]

In their opposition to WASA's petition, the Federal Respondents concede several points that support WASA's petition. First, they agree with WASA that the United States Court of Appeals for the District of Columbia Circuit in *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006), wrongly decided that Total Maximum Daily Loads ("TMDLs") must be expressed only as a quantity of pollutant over a 24-hour day. Fed. Resp't Br. 7-9. Second, they agree with WASA that the decision of the United States Court of Appeals for the Second Circuit in *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001), upholding non-daily TMDLs was correctly decided. Fed. Resp't Br. 10. Third, they agree with WASA that these two decisions present a clear conflict between the circuits. Fed. Resp't Br. 10.

Notwithstanding these concessions, the Federal Respondents assert that the conflict between the circuits does not warrant this Court's review because (1) the decision below is controlling law only in the District of Columbia, and (2) the flexibility provided by a recent guidance memorandum issued by the Environmental

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[1] In their opposition, Respondent Friends of the Earth, Inc. defends the panel decision on the merits and does not raise new points meriting further reply. WASA relies upon the argument made in its Petition in this regard.

Protection Agency ("EPA") will limit the prospective effect of the disagreement between the D.C and Second Circuits. Fed. Resp't Br. 10. These arguments are fundamentally flawed and, if anything, support rather than undermine WASA's petition.

First, the Federal Respondents' attempt to minimize the impact of the panel ruling by characterizing it as controlling law only in the District of Columbia fails to acknowledge the D. C. Circuit's predominant role in reviewing agency action and environmental disputes. Congress has directed that rulemaking challenges under key environmental statutes be filed in the D. C. Circuit. *E.g.*, 42 U.S.C. § 7607(b) (Clean Air Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act). This Court has long recognized that "[s]ince the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court . . . will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 535 (1978). Other federal courts also view the decisions of that circuit as important guidance in such matters. *E.g., Natural Resources Defense Council, Inc. v. Fox*, 93 F. Supp. 2d 531, 543 (S.D.N.Y. 2000). Therefore, there is no valid basis for minimizing the significance of the D. C. Circuit's decision and the clear circuit conflict presented on a matter affecting literally "thousands of different waterbodies" nationwide. *Muszynski*, 268 F.3d at 97.

Second, the new EPA guidance memorandum relied on by the Federal Respondents is in direct conflict with and contrary to their claim that the D. C. Circuit's ruling has a limited impact. The guidance is directed to all EPA regional offices. Fed. Resp't Br. App. 1a. In the guidance, EPA

acknowledges that "there is significant legal uncertainty about whether courts across the country will follow the reasoning of the D. C. Circuit decision" and "recommends that all future TMDLs . . . be expressed in terms of daily time increments." Fed. Resp't Br. App. 2a-3a. This effectively adopts the D. C. Circuit's decision and applies it nationwide.

Contrary to the Federal Respondents' argument, EPA's new guidance memorandum will compound rather than minimize the adverse consequences of the opinion below. While directing that TMDLs are to be expressed on a daily basis, the guidance then provides that the EPA regions and States can continue to write permits containing non-daily limits to implement the daily TMDLs. Fed. Resp't Brief. App. 2a.

Thousands of non-daily TMDLs have either been developed or are under development nationwide. These TMDLs, in turn, establish the basis for countless water quality-based effluent limitations involving billions of dollars of municipal wastewater infrastructure. If left standing, the D.C. Circuit's decision, even as explicated by the new guidance, will lead to protracted litigation across the country. Even if respondent Friends of the Earth were content to accept the new guidance (and nothing in its filing suggests that it would accept it), there are many potential litigants with likely standing who can be expected to commence litigation. WASA respectfully submits that finite public resources would be better spent on water quality improvement rather than in unbounded litigation.

CONCLUSION

Notwithstanding the new guidance from EPA, there will remain an intercircuit split that threatens combined

sewer overflow control planning and implementation to the detriment of water quality, making this case "cert-worthy." Wherefore, WASA requests that this Court grant WASA's petition and resolve this conflict between the circuits.

Respectfully Submitted,

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DISTRICT OF COLUMBIA WATER AND SEWER AUTHORITY,

Petitioner,

v.

FRIENDS OF THE EARTH, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND THE WET WEATHER PARTNERSHIP IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

The National Association of Clean Water Agencies ("NACWA") represents the interests of the nation's publicly owned wastewater treatment agencies.[2] NACWA is comprised of nearly 300 municipal clean water agency members that provide services to the majority of the United States' population served by sewer systems. NACWA members operate municipal publicly owned treatment works ("POTWs") under federal and state laws and regulations in cities and towns across the United States, and collectively treat and reclaim over 18 billion gallons of wastewater each day. In addition to operating POTWs, eighty of NACWA's member agencies, including the District of Columbia Water and Sewer Authority ("WASA"), also operate combined sewer overflow ("CSO") collection systems that serve approximately 44.6 million people. Thirty-two states have communities with combined sewer systems.

NACWA supports WASA's petition for a writ of certiorari seeking review of the decision by the D.C. Circuit due to its broad and immediate impact on all NACWA members, particularly those like WASA that operate combined sewer collection systems. The ramifications of the D.C. Circuit decision extend far beyond the Anacostia River in the District of Columbia and will significantly impact NACWA's CSO member communities nationwide. A recent survey of forty-seven of NACWA's CSO member communities revealed

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[1] Written consent for the filing of this brief was granted by all of the parties pursuant to Supreme Court Rule 37. The signed consent letters are being sent to the Court under separate cover letter along with the brief.

[2] The National Association of Clean Water Agencies ("NACWA") was formerly the Association of Metropolitan Sewerage Agencies ("AMSA"). On May 2, 2005, AMSA, established in 1970, amended its Articles of Incorporation to change its name to the National Association of Clean Water Agencies.

that these cities collectively have spent $5.1 billion (ranging from expenditures of $100,000 to $2.4 billion) in capital dollars and $39.6 million (ranging from expenditures of $50,000 to $4.5 million) in operation and maintenance dollars toward the implementation of their Long Term Control Plans ("LTCPs") to comply with CSO requirements. The D.C. Circuit decision undermines the implementation of these LTCPs because these LTCPs have generally been developed to meet seasonal or annual pollutant loads, not the daily loads required by the D.C. Circuit decision. The decision will undercut the efforts of communities nationwide to implement the combined sewer overflow policy contained in section 402(q) of the federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"). Additionally, other NACWA members that do not operate combined sewer systems but discharge to impaired waters that require TMDLs (which ultimately are incorporated in enforceable National Pollutant Discharge Elimination System ("NPDES") permits) are impacted because the status of existing and future TMDLs is now uncertain.

The Wet Weather Partnership ("the Partnership"), until recently named the Combined Sewer Overflow Partnership, is dedicated to representing the interests of the approximately 800 communities with combined sewer systems nationwide. The Partnership's approximately 80 members have invested hundreds of millions of dollars in the planning, design, permitting and construction of CSO control facilities in accordance with EPA's CSO Policy, incorporated by reference into CWA section 402(q). 33 U.S.C. §1342(q). As the district court in this case recognized, CSO communities cannot comply with the CSO Policy or CWA section 402(q) if TMDLs must be based on a daily approach. Friends of the Earth, Inc. v. Environmental Protection Agency, 346 F. Supp. 2d 182, 191, n. 4 (D.D.C. 2004).

These enormous public investments were not designed to meet the new "daily" pollutant loading

regulatory requirement announced by the D.C. Circuit. Such a daily loading requirement is likely to trigger a reevaluation of most CSO control programs and may well strand or limit the utility of CSO control investments by Partnership members.

SUMMARY OF ARGUMENT

This case presents a direct conflict between two decisions by circuit courts of appeals on the interpretation of a fundamental Clean Water Act provision that will affect cleanup plans for thousands of impaired surface waters across the nation. Decisions by the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Second Circuit are in direct conflict over the proper construction of section 303(d) of the CWA. Construing the same statutory language (in particular, the word "daily), the D.C. Circuit said " [w]e cannot imagine a clearer expression of intent" while the Second Circuit found such an interpretation of the statute to be "absurd." Friends of the Earth, Inc. v. Environmental Protection Agency, 446 F. 3d 140, 144 (D.C. Cir. 2006); Natural Resources Defense Council, Inc. v. Muszynski, 268 F. 3d 91, 99 (2d Cir. 2001). This intercircuit conflict puts in doubt cleanup plans currently in existence and those under development for up to 40,000 impaired rivers, lakes, and streams nationwide.

Beyond the intercircuit conflict, the D.C. Circuit's decision requires review because it (1) reverses a long-standing agency interpretation that has served as the basis for several national water quality programs; (2) is based on a faulty statutory analysis which led the circuit court to incorrectly dismisses key substantive amendments to the Clean Water Act as being merely "subsequent legislative

history" that the court held to have no "relevance;" [3] (3) creates regulatory uncertainty for a number of important national water quality programs; and (4) might trigger further litigation over the cleanup plans at issue as well as for similar cleanup plans for waters nationwide.

Review by this Court is warranted because the D.C. Circuit's ruling undermines the legal validity and implementation of cleanup plans for waters nationwide and the associated years of program implementation by EPA and the states. The D.C. Circuit Court acknowledged the immediate and substantial impacts of its decision by suggesting in its opinion ways to delay the loss of protection for the Anacostia River that would result from an immediate exercise of the court's invalidation of the two challenged cleanup plans before it. Friends of the Earth, 446 F. 3d at 148. However, the court left in legal limbo all other non-daily cleanup plans for District of Columbia waters as well as other impaired waters nationwide. This immediate and highly significant adverse impact on impaired water cleanup plans nationwide warrants a prompt review by this Court.

Finally, review by this Court is necessary to prevent long-standing and substantial EPA and state water quality programs from being plunged into uncertainty over the proper standards to use in establishing cleanup plans.[4] These programs were

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[3] Conversely, the District Court correctly construed the effect of these amendments, recognizing "It needs hardly be said that when Congress acts to amend a statute, [courts] presume it intends its amendment to have real and substantial effect." Friends of the Earth, Inc. v. Environmental Protection Agency, 346 F. Supp. 2d 182, 191 n.4 (D.D.C. 2004), citing Stone v. INS, 514 U.S. 386, 397 (1995).

[4] In the nearly four months since the decision, EPA has not indicated an intention to follow the suggestion by the D.C. Circuit to amend its regulation that declared all pollutants suitable for daily loads. 43 Fed. Reg. 60,662, 60,665 (Dec. 28, 1978). In its

established on the basis that in many cases cleanup plans and TMDLs are properly expressed in measures other than daily parameters. That foundation, which has been in place for decades, is now called into question nationwide. Only review by the Court will resolve this dispute and prevent the disruptions, regulatory uncertainty and the loss of cleanup plan protections for impaired waters that will otherwise follow.

ARGUMENT

I. An Intercircuit Conflict Exists Over the Interpretation of a Fundamental Provision of the Federal Clean Water Act That Affects Cleanup Plans for Thousands of Impaired Waters Nationwide.

A. The Circuit Split Creates Uncertainty Regarding the Correct Requirements for Establishing Allowable Pollutant Loads to Impaired Waters.

The conflicting decisions by the D.C. Circuit and the Second Circuit create uncertainty about whether cleanup plans for impaired waters must be expressed in daily terms or whether non-daily expressions are permissible. This uncertainty will likely result in conflicting regulatory requirements as EPA, states, regulated entities and communities, and various interest groups disagree as to which interpretation of the Act to follow. This conflict will create situations where a river or steam that runs

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recent pleading after remand to the district court, EPA stated that it is not the agency's plan "at this time" to revise the 1978 regulation. EPA Motion to Stay Order of Vacatur, filed Aug. 8, 2006 at p. 4, n.2.

through different jurisdictions could subject dischargers to conflicting regulatory requirements. The Anacostia River is a prime example of this situation as it begins in Maryland (Fourth Circuit) and runs through the District of Columbia (D.C. Circuit). Annual pollutant loadings could be permissible in one part of the river, while daily loading could be required in another part. Notably, numerous non-daily TMDLs have been developed within the Fourth Circuit, including several accepted by district courts pursuant to federal TMDL consent decrees.[5]

A patchwork of conflicting approaches, rules and methods is likely to emerge as states outside the D.C. Circuit and Second Circuit develop cleanup plans and TMDLs and decide which approach to adopt.[6] This confusion and uncertainty will increase costs for the regulated community and ratepayers and make the mission of maintaining and improving water quality in our nations' waters more difficult. In addition to the regulatory uncertainty, this situation potentially strands billions of dollars in investments in CSO programs and other water quality programs in communities nationwide, as communities must decide whether to continue to fund programs where the requirements and standards are not certain. These impacts and costs are discussed below.

B. After Decades of Implementation by EPA Based Upon the Interpretation of the CWA Supported by the Second Circuit Decision,

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[5] A listing of EPA's TMDL-related consent decrees by states is available at: http://www.epa.gov/owow/tmdl/lawsuit1.html.

[6] EPA has added to this uncertainty in the months since the D.C. Circuit decision by circulating a draft "policy" in response to the D. C. Circuit decision to some stakeholders for comments. This policy acknowledges the impact of the D.C. Circuit ruling by stating that TMDLs must be written in daily terms, but does not require that permits implementing those TMDLs have daily limits. BNA Daily Environment Report, July 27, 2006, p. A-12.

the D.C. Circuit's Ruling Now Undermines Numerous Existing Water Quality Programs.

The D.C. Circuit's decision undermines the longstanding EPA interpretation that maximum pollutant loads may be expressed in non-daily terms, and casts doubt on many regulatory programs premised upon this interpretation.[7] EPA regulations since 1985 have been based upon the interpretation that TMDLs may be expressed in periods longer than a twenty-four hour period. 50 Fed. Reg. 1779, 1776 (Jan. 11, 1985); 64 Fed. Reg. 46031 (Aug. 23, 1999). The decision by the D.C. Circuit invalidating this interpretation could undermine this progress and chill the development of future TMDLs. The following are some of the programs and actions premised upon the validity of cleanup plans expressed in non-daily terms.

1. EPA and State Impaired Waters Programs.

Section 303(d) of the CWA requires states to identify impaired waters and then prepare cleanup plans (TMDLs) for those waters. States must then submit the TMDLs to EPA for approval. 33 U.S.C. §§ 1311(b)(1)(C); 1313(e)(3)(A).

If EPA follows the D.C. Circuit view that all cleanup plans must impose daily loads (in spite of the fact that EPA's current regulations state otherwise), the pace of TMDL development will be disrupted and numerous existing plans based on non-daily approaches already approved by EPA and the states may be invalidated.[8] In the District of Columbia, EPA

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[7] The D.C. Circuit Court ignored the argument that a longstanding interpretation placed on a statute by an agency charged with its administration is entitled to "great weight." NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 275 (1974).

[8] As noted in footnote 6, EPA has circulated a draft policy memorandum stating its view that all TMDLs now should be

has approved other TMDLs beyond those at issue in this case which use non-daily loads.[9] EPA Region III has also approved numerous TMDLs in Maryland and Virginia that rely upon annual loads.[10] These TMDLs are subject to challenge based upon the D.C. Circuit's decision. The impact of invalidating these TMDLs would not only have adverse regulatory consequences but would also have adverse environmental consequences. As Friends of the Earth conceded in its brief to the D.C. Circuit, "adverse environmental implications would result from vacating the TMDLs" in this case. FoE Br. at 47. Requiring daily loads for all TMDLs would stall – or completely undermine - implementation of numerous non-daily TMDLs.

Enormous public and private resources have already been invested in the development and implementation of these TMDLs. These investments will be diminished, disrupted, or wasted if these TMDLs must be redone based on daily loadings.

2. The Combined Sewer Overflow Program Established in Section 402(q).

Communities across the country with combined sewer collection systems have been designing and constructing sewer system improvements to implement the Combined Sewer Overflow Policy (the "CSO Policy") adopted by EPA in 1994 and incorporated into Section 402(q) CWA in 2000.

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expressed in daily terms in light of the D.C. Circuit's decision. BNA Daily Environment Report, July 27, 2006, p. A-12.

9 *See, e.g.*, District of Columbia TMDLs available at: http://www.epa.gov/reg3wapd/tmdl/D.C._tmdl/index.htm.

10 *See, e.g.*, Maryland TMDLs available at: http://www.mde.state.md.us/Programs/WaterPrograms/TMDL/index.asp.

See also, Virginia TMDLs available at: http://www.deq.virginia.gov/tmdl/apptmdl.

Numerous communities have signed federal consent decrees committing to massive public works projects, often costing billions of dollars in the larger systems, in order to comply with the CSO Policy.[11]

The CSO Policy, however, is at odds with the D.C. Circuit's decision mandating daily loads in TMDLs, as WASA explained in its petition for certiorari. DC WASA Pet. for Certiorari, at 12-15. The CSO Policy promotes a flexible, site-specific approach to CSO control, which is contrary to the daily loading approach required in the D.C. Circuit decision. Section II.C.4.a of the CSO Policy lays out three "presumptive" levels of CSO control that are presumed to achieve water quality standards. 59 Fed. Reg. 18,688, 18,692 (April 19, 1994). The first option, for example, is "no more than an average of four overflow events per year, provided that the permitting authority may allow up to two additional overflow events per year." The other two options are 85 percent capture of wet weather flows for treatment either on a volume or mass basis. These three options for CSO control, outlined in EPA's CSO Policy, and endorsed by Congress in CWA Section 402(q), are fundamentally inconsistent with the D.C. Circuit's daily load position. For example, the four to six untreated annual average overflows approach is fundamentally inconsistent with a daily pollutant-loading requirement for bacteria, for example. Thus, any CSO community that has developed and is implementing its CSO program around one of the three "presumptive" criteria established in the CSO Policy could have to completely reevaluate their approach if a daily loading approach is required. This could cause significant disruption and cost billions of dollars in stranded public infrastructure as well as additional future control costs not intended by Congress.

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[11] U.S. Environmental Protection Agency, Report to Congress on Implementation and Enforcement of the Combined Sewer Overflow Control Policy, (Dec. 2001).

The district court recognized this problem, stating that "if municipalities cannot calculate non-daily TMDLs for their sewage overflow programs, they cannot implement EPA's CSO Policy." Friends of the Earth, 346 F. Supp. 2d at 191, n 4. Thus, the intercircuit conflict casts doubt on the validity of much of EPA's CSO Policy and the investments made in reliance on it.

3. The Chesapeake Bay Program

The cleanup plan for the Chesapeake Bay, which involves billions of dollars in investments by governments, utilities, and private companies in Maryland, Virginia, the District of Columbia, Delaware, Pennsylvania, West Virginia and New York, is premised upon an EPA decision concluding that annual permits limits are legal, necessary and appropriate in permits in the Chesapeake Bay watershed. EPA memorandum dated March 3, 2004.[12] The EPA memorandum considered the issue of whether EPA may express effluent limits for nitrogen and phosphorous for hundreds of permits designed to protect the Chesapeake Bay as an annual limit, or whether EPA must express the limits as a daily maximum, weekly average, or monthly average effluent limitations due to the language in section 303(d). In the memo, EPA considered the legal, scientific and policy rationales for deciding whether it may select annual limits instead of imposing limits on a daily, weekly, or monthly basis. EPA concluded that as a legal matter its regulations allow it to impose annual limits where the other limitations such as daily limitation would be "impracticable." 40 C.F.R. § 122.45(d). EPA then determined that the characteristics of nitrogen and phosphorous, when combined with the unique characteristics of the

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[12] See http://www.epa.gov/npdes/pubs/memo_chesapeakebay.pdf.

Chesapeake Bay, make the imposition of daily, weekly or monthly limits impracticable. March 4, 2004 memorandum at 3-5. EPA describes why daily, weekly or monthly limits would be virtually impossible to calculate; nutrients react differently than toxics and conventional pollutants in the Bay ecosystem.

The entire cleanup of the Chesapeake Bay is premised upon the approach in this EPA memorandum. All of the commitments to date by EPA, the states (including extensive legislative funding and regulatory enactments), public utilities and private companies, are founded upon this non-daily approach. Requiring daily loads will undermine the fundamental approach of the Bay Program restoration effort and several billions of public dollars being invested toward compliance with the annual average loading approach for the Bay Program. Moreover, requiring a daily loading approach rather than an annual loads approach would increase the Bay Program costs by billions of dollars on top of the tens of billions already estimated.[13]

C. The D.C. Circuit Decision Invites EPA to Exempt Numerous Impaired Waters from the Cleanup Plan Program, a Result Contrary to the Primary Purpose of the Clean Water Act.

The fundamental purpose of the CWA is to restore impaired waters and prevent the future degradation of existing water quality. 33 U.S.C. § 1251. The D.C. Circuit decision construes the statute to require cleanup plans for impaired waters where

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[13] The same is true for other regional waterbodies such as the Long Island Sound program, in which EPA Region II developed a TMDL for nitrogen that imposes annual loads as the compliance measure for dozens of regulated entities discharging to the Long Island Sound. See http://www.epa.gov/region01/eco/lis/assets/pdfs/Tmdl.pdf

daily load allocations are possible but where the pollutant in question is not suitable for daily load allocations, the court says EPA can simply exclude such pollutants from the program and no cleanup plan would be developed for waters receiving such pollutants. This construction effectively abandons the goal of restoring the water in question.

The D.C. Circuit's interpretation that all TMDLs must be expressed in terms of daily loads will result in only certain impaired waters being restored while other waters will be abandoned. This is nonsensical when cleanup plans expressing non-daily loads can be readily developed and would fulfill the primary purpose of the statute in restoring rather than abandoning these impaired waters. Thus, the D.C. Circuit's holding would absurdly and impermissibly conflict with the overall purpose of the Act. See, Church of the Holy Trinity v. United States, 143 U.S. 457, 460 (1892); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982) (interpretation of statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available).

Because of this statutory conflict, the Second Circuit found the Act to be ambiguous and deferred to EPA's interpretation that it could specify non-daily cleanup plans for such waters. This Court should follow the Second Circuit's ruling which provides a consistent and integrated reading to the Act rather than the internally conflicting interpretation necessarily resulting from the D.C. Circuit's ruling.

The Chesapeake Bay presents a potential example of how the D.C. Circuit's decision could be applied to create a situation clearly not intended by Congress. The Bay is impaired by nitrogen and phosphorous discharges from hundreds of point sources and thousands of non-point sources from six states. EPA has found that nutrient loadings to the Bay are not suitable for daily load calculation and, instead, has taken an annual approach. See fn.12

infra. The D.C. Circuit's decision would preclude that annual approach and because nutrient discharges to the Bay are not suitable for daily load limits, require no cleanup plan be developed for the Bay. This is the very absurd statutory dead end that the Second Circuit and several district courts have avoided by an interpretation of the Act viewing its provisions together rather than isolating the word "daily" in section 303(d).

Moreover, the D.C. Circuit's decision is practically unworkable because in the example of the Chesapeake Bay, EPA and the states must allocate nitrogen and phosphorous discharges to the Bay among hundreds of point sources and thousands of non-point sources across six states in order to ensure that water quality standards will be met in the Bay. If EPA and the states cannot do this using a non-daily TMDL/cleanup plan (for example through the proposed annual average approach) they can never ensure all of these discharges collectively will result in the attainment of water quality standards. There is no other way other than through a comprehensive allocation/cleanup plan. The D.C. Circuit's holding that TMDLs must impose "daily" loadings impermissibly conflicts with the structure and purpose of the CWA.

II. The D.C. Circuit Decision Improperly Construed the CWA.

A. The D.C. Circuit Decision Failed to Properly Consider Other Provisions of the CWA That Demonstrate Congress Did Not Mandate a Daily Approach in All Contexts.

The statutory analysis of the Clean Water Act by the D.C. Circuit failed to properly consider the context of section 303(d) in the CWA and too narrowly focused on only one word in the statute. The court essentially stopped its analysis at the word "daily" in

the undefined term "total maximum daily load," saying that it saw "nothing ambiguous about this command," citing to Webster's Dictionary and the Bible as its authority for its simple conclusion that "daily connotes every day." Friends of the Earth, 446 F. 3d at 144. The court then brushed aside all other arguments, including the contention that when considering the context of the word "daily" in the Clean Water Act, its meaning becomes less certain. The D.C. Circuit reached its conclusion that the statute is clear on its face even though three previous courts, the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Columbia, all concluded that section 303(d) was ambiguous in light of the overall CWA structure. Accordingly, those courts deferred to EPA's interpretation that it can develop non-daily TMDLs.

As the D.C. Circuit correctly noted, "the question for the court is not whether Congress understood the meaning of the word 'daily' when it inserted it into the CWA, but whether Congress had an intent regarding the applicability of the daily load concept to the CWA." Friends of the Earth, 346 F. Supp. 2d at 189. The district court then held that the text of the CWA does not reveal clear congressional intent to require EPA to calculate only daily TMDLs and exclude all other possible calculations. Id. In reaching its conclusion that the meaning of section 303(d) was ambiguous in some contexts, the district court correctly relied on the context supplied by both sections 402(p) and 402(q) of the CWA.

The D.C. Circuit, by contrast, only considered the argument that the meaning of 303(d) is ambiguous when viewed in the context of 402(q), and failed to consider the whether section 402(p) demonstrated Congressional intent on the meaning of section 303(d). The D.C. Circuit oddly and incorrectly dismissed 402(q) as being "subsequent legislative history" with

no "relevance" to Congress' intent and incorrectly overlooked 402(p). The D.C. Circuit should have considered what these sections reveal about the intent of Congress because, as the district court found, the 402 sections "reveal an ambiguity in the intent of Congress." Friends of the Earth, 346 F. Supp. 2d at 191. Sections 402(q) and 402(p) are part of the fabric of the Clean Water Act and should have been given their place in the statutory scheme by the court. The CWA should be interpreted as it is now written, not as it existed in 1972.

B. Section 402(p) of the CWA Demonstrates Congress' Intent Not to Require Daily Loads in all Contexts.

While neither EPA nor WASA argued in their briefs before the D.C. Circuit that section 402(p) of the CWA demonstrates that Congress did not intend to impose a strict daily approach in all contexts, the provision, dealing with industrial and municipal discharges of storm water, does show that Congress understood the difference between daily and non-daily approaches and did not require daily approaches in all contexts. Section 402(p)(3)(A) – industrial discharges – requires permits to meet the stricter often daily permitting requirements while in the very next section, 402(p)(3)(B) dealing with permits for discharges from municipal separate storm sewer systems ("MS4s"), Congress chose a different approach based on a system or jurisdiction-wide basis requiring controls to reduce pollutants to the *maximum extent practicable*, including practices, control techniques and system design and engineering methods." 33 U.S.C. § 1342(p)(3)(B).[14] Thus, in enacting CWA 402(p)(3) in

[14] Other CWA provisions also conflict with the D.C. Circuit's interpretation reading of the statute. *See, e.g.*, Subchapter II – Grants for Construction of Treatment Works – CWA Sections 1281 through 1301. These sections authorized federal grant funding to

1987, Congress recognized that different control strategies are needed for different pollutant sources, and recognized that storm sewer discharges are different from discharges from industrial or municipal treatment plants.[15] EPA elaborated on Congress' authorization in the preamble to its rulemaking establishing the regulations for MS4s, noting that the CWA authorizes a storm water pollutant control program in the form of a "management" control program rather than the "end-of-pipe numeric effluent limits." 64 Fed. Reg. 68,722, 68,765 (Dec. 8, 1999) (the "Phase II" storm water regulations). Like Section 402(q), the storm water management control program created by Congress in CWA Section 402(p) is also inconsistent with the daily loading arguments advanced by FoE. CWA Section 402(p)(3) recognizes that the best form of effluent limitation for these types of permits (due to the fact that the discharges are caused by intermittent rainfall events) are flexible, site-specific approaches. See 40 C.F.R. § 122.34(a) ("narrative effluent limitations requiring implementation of best management practices are generally the most appropriate form of effluent limitations when designed to satisfy technology requirements including reductions of pollutants to the maximum extent practicable and to protect water quality."). These narrative effluent limitations cannot be expressed as daily pollutant loads.

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install secondary treatment technology at approximately 15,000 publicly owned treatment works nationwide. Congress invested billions of federal taxpayer dollars on these installations. Secondary treatment is defined as "monthly" and "weekly" requirements for certain pollutants, including Total Suspended Solids (TSS) and Biochemical Oxygen Demand (BOD) – the pollutants at issue in this case. *See* 40 C.F.R. § 133.102.

[15] Storm water discharges are the result of periodic rain events, while discharges from industrial and municipal treatment plants (not associated with combined sewer systems) occur on a continuous, largely predictable and controlled basis.

Accordingly, the D.C. Circuit's conclusion that daily loads must be developed for and imposed on the District's storm water discharges of BOD and TSS to the Anacostia River runs counter to the express language of section 402(p)(3)(B). Where different sections of the statute cannot be read together, an ambiguity exists and EPA's interpretation must be reviewed under a Chevron Step II analysis.

C. The D.C. Circuit Incorrectly Dismissed A Key Substantive CWA Amendment as Subsequent Legislative History with No Relevance to the Meaning of the Statute.

In dismissing the argument that the CWA amendments in 2000 adding section 402(q) to the Act shed light on the meaning of section 303(d), the court mistakenly called the addition of 402(q) to the Act "post-enactment legislative history" and said it had no "relevance" in determining the meaning of other provisions in the Act. Friends of the Earth, 446 F. 3d at 147. A key substantive amendment to the Act, however, is not legislative history, but rather is a part of the Act and its provisions must be given considered when interpreting other parts of the Act.

The court incorrectly dismissed section 402(q) as subsequently legislative history. The court's reliance on Cobell v. Norton for the proposition that amendments to an act are only "post-enactment legislative history" was misplaced. Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005). In Cobell, the court considered whether appropriation bills in 1994 and 2004 and the legislative history of the bills (referring to a quotation from one Senator) shed light on the government's obligation to account for funds held in trust for American Indians based on the trust relationship first established in the General Allotment Act of 1887. The facts and statutory issues in Cobell have no bearing on the issues in this case, where subsequent Congressional amendments to the CWA

added important substantive provisions which are clearly pertinent to understanding Congressional intent.

Another case cited by the D.C. Circuit on this issue, but not followed, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000), is directly on point and the D.C. Circuit should have followed the approach to statutory construction set forth by the Supreme Court in that case. This Court, in construing the Food, Drug, and Cosmetic Act (FDCA) of 1914 and subsequent legislation on tobacco products, set forth the applicable principles for statutory construction, stating that "a reviewing court should not confine itself to examining a particular statutory provision in isolation" and "ambiguity is a creature not of definitional possibilities but of statutory context." FDA at 132-133, citing Brown v. Gardner, 513 U.S. 115, 118 (1994). The Court closely examined Congressional legislation after the passage of the FDCA in 1914 to determine the intent of Congress on the issue of whether Congress intended the FDA to regulate tobacco products. Subsequent legislation was relied on heavily by this Court in determining Congressional intent. FDA, 513 U.S. at 161. Thus, the D.C. Circuit was incorrect to dismiss subsequent CWA amendments as having no relevance to whether TMDLs can only impose daily loads. Had the court construed section 303(d) in light of Congress' intent in enacting section 402(q) rather than simply dismissing 402(q) as having no relevance, it would have concluded that 303(d) did not evidence a clear Congressional intent.

III. The Court of Appeals Ignored a Critical Element of EPA's Governing Regulations to Avoid Reviewing EPA's Determination Regarding the TMDLs at Issue in this Case and Instead Decided the Case Based on a Statutory Analysis that was Not Required.

The CWA requires EPA to identify all pollutants suitable for the development of Total Maximum Daily Loads ("TMDLs") and then develop TMDLs for waters impaired by those pollutants. 33 U.S.C. § 1313(d). Congress explicitly gave EPA the discretion to decide for which pollutants TMDLs must be developed. In the exercise of that discretion, EPA determined in 1978 that "all pollutants, under the proper technical conditions, are suitable for the calculation of total maximum daily loads." 43 Fed. Reg. At 60,665 (emphasis added). Thus, EPA properly reserved the ability to determine, on a case-by-case basis, that the proper technical conditions do not exist to support development of a TMDL imposing daily loads for a particular pollutant discharged to a particular water or segment thereof.

EPA applied this discretion in this case by finding that the proper technical conditions did not exist to support the development of TMDLs expressing daily loadings for BOD and TSS for the Anacostia River. The district court properly deferred to EPA's discretion and upheld EPA's determination that daily loadings were not technically appropriate for BOD and TSS discharges to the Anacostia River. The district court concluded that a TMDL with daily loadings was not mandated under these circumstances under Section 303(d) of the Act. While not required to do so, the district court then held that EPA had the discretion to develop a TMDL imposing non-daily loadings.

The D.C. Circuit committed error by misstating EPA's determination that the proper technical conditions do not exist to make daily loadings suitable for BOD and TSS discharges to the Anacostia River. The court cited in its decision to EPA's regulation in question but omitted the key language "under the proper technical conditions." 446 F. 3d at 144. The court then incorrectly attributed to EPA an unqualified regulatory determination that all pollutants are suitable for daily TMDL loads.

Having attributed to EPA a finding that all pollutants are suitable for daily loads, a finding that is flatly contradicted by the full regulatory citation and in direct contrast to the actual EPA and district court positions in this case, the court of appeals then conducted a statutory analysis which it should never have reached. The court then compounded the error by reaching a different conclusion from the Second Circuit, creating a direct intercircuit conflict that should have been avoided.

This Court should remand this case to the D.C. Circuit with instructions for the D.C. Circuit to decide whether EPA's determination that the pollutants at issue are not suitable for daily load limits in this case is valid. If valid, the case should be dismissed, as no TMDL is required under CWA Section 303(d) for these pollutants being discharged to the Anacostia.

IV. Conclusion

The intercircuit conflict ("absurd" versus "clear") creates untenable uncertainty over CWA programs and cleanup plans for thousands of impaired rivers, lakes and streams nationwide. This conflict undermines the validity of these programs and many existing and prospective cleanup plans. Review by this Court now is necessary to resolve this circuit split and, thereby, facilitate continued progress toward restoring impaired waters nationwide – the fundamental goal of the Clean Water Act.

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